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No. 87-5002

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,
Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

BRIEF OF APPELLEE

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WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

BRIEF OF APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in the Brief of Appellant, the following provisions are cited in the Brief of Appellee:

> A lawyer should represent a client zealously within the bounds of the law
>
> (1) Ethical consideration.
>
> . . .

. . . .

(c) Where the bounds of law are uncertain, the action of a lawyer may depend on whether he or she is serving as advocate or advisor. A lawyer may serve simultaneously as both advocate and adviser, but the 2 roles are essentially different. In asserting a position on behalf of his or her client an advocate for the most part deals with past conduct and must take the facts as he or she finds them. By contrast, a lawyer serving as adviser primarily assists his or her client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. In serving a client as adviser a lawyer in appropriate circumstances should give his or her professional opinion as to what the ultimate decisions of the court would likely be as to the applicable law.

SCR 20.34 (repealed, effective January 1, 1988).

Representing a client within the bounds of the law

(1) In his or her representation of a client, a lawyer may not:

. . . .

(b) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

SCR 20.36 (repealed, effective January 1, 1988).

Meritorious Claims and Contentions

Text of rule eff. Jan. 1, 1988

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

SCR 20:3.1.

SUMMARY OF ARGUMENT

The discussion requirement of Wisconsin Rule 809.32(1) is not in violation of Anders v. California, 386 U.S. 739 (1967), and it does not violate McCoy's constitutional rights. An attorney satisfies his obligation to be an advocate for a defendant when in examining the record and the law he resolves in favor of his client all doubt on whether an issue is frivolous. In satisfying the discussion requirement, the attorney is not acting as amicus curiae. The discussion requirement promotes the purposes of the no merit procedure outlined in Anders by assisting the defendant in it assurance that his attorney is giving effective representation and by assisting the court in its disposition of what is purported to be a frivolous matter. Because

Wisconsin's rule does not conflict with Anders and it does not violate a defendant's constitutional rights, it should be found valid even though other states may have adopted other acceptable procedures for handling no merit cases.

ARGUMENT

WISCONSIN RULE 809.32(1) IS CONSISTENT WITH THE REQUIREMENTS SET FORT IN ANDERS, AND IT DOES NOT DEPRIVE MR. McCOY OF HIS RIGHTS TO APPEAL, TO DUE PROCESS ON APPEAL OR TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY A "NO MERIT" APPEAL LACKS MERIT.

Ellis T. McCoy, appellant, contends that the discussion requirement in Wisconsin Rule 809.32(1) is contrary to Anders and Ellis v. United States, 356 U.S. 674 (1958) because it requires his appointed attorney to act as amicus curiae rather than as an advocate on his

behalf. As a result, he concludes that by following the rule his counsel would effectively deprive him of his right to an appeal, to due process on appeal and to effective assistance of counsel.

Anders, 386 U.S at 744, provides that if an appointed appellate counsel "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." The request, however, must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id.

Anders demands that in performing these tasks, the appellate attorney act "in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." Id. In the role of the advocate, the appointed attorney

should not brief his case against his client. Anders, 386 U.S. at 745.

The procedure explained in Anders assists the attorney's client by requiring that his attorney conduct a conscientious examination of the case and prepare a brief that refers to the record and legal authorities. Anders, 386 U.S. at 744-45. In protecting the attorney from charges that he was ineffective, Anders, 386 U.S. at 745, the procedure also assures that the attorney has provided effective representation to his client.

The procedure assists the court in carrying out its function of deciding whether the appeal is frivolous by requiring a brief that furnishes the court with ready references to the record and the legal authorities relied upon by counsel. Anders, 386 U.S. at 744-45.

Because the discussion requirement in Wisconsin Rule 809.32(1) permits the appointed attorney to act as an advocate on behalf of his client while assisting his client and the court, the rule is consistent with Anders and does not deprive McCoy or other indigent clients of their constitutional rights.

A. The appointed attorney acts as an advocate in behalf of his client when satisfying the discussion requirement and the other provisions of Wisconsin Rule 809.32(1).

McCoy argues that when his attorney discusses why the issues in the brief lack merit, in compliance with Wisconsin Rule 809.32(1), his attorney is acting as an amicus curiae rather than as an advocate on his behalf.

McCoy is wrong. An attorney can fulfill his obligation to be an advocate

for his client while complying with the discussion requirement of the rule.

"The obligations owed by the attorney to the client are defined by the professional codes . . . ." Polk County v. Dodson, 454 U.S. 312, 327 (1981) (Burger, Chief Justice, concurring). The Code of Professional Responsibility applicable to McCoy's attorney in Wisconsin when the no merit brief was filed required the attorney to represent his client zealously within the bounds of the law. SCR 20.34. When the bounds of the law are uncertain "the action of the lawyer may depend on whether he or she is serving as advocate or adviser." SCR 20.34(1)(c).

> While serving as advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his or her professional opinion as

> to what the ultimate decisions of the courts would likely be as to the applicable law.

SCR 20.34(1)(c).

The advocate differs from an adviser in SCR 20.34(1)(c) in the same way that an advocate differs from amicus curiae because an amicus has the function of advising in order that justice may be done rather than advocating a point of view so that a cause may be won by one party or another. See Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. E.D. 1982) and Allen v. County School Board of Prince Edward County, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961).

In the context of the no merit report filed under Wisconsin Rule 809.32(1), the appointed attorney acts as an advocate in reviewing the record and legal authorities and resolving all doubts in favor of his client on the

question of whether an issue is frivolous. As explained in Com. v. McClendon, 495 Pa. 467, 434 A.2d 1185, 1188 (1981):

> The role of an advocate, insisted upon in Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more.
>
> When counsel has concluded that the appeal is frivolous after resolving all doubts in favor of his client, the advocacy role has ended because his ethical obligations prohibit him from advancing such a claim. In Wisconsin, SCR 20.36(1)(b) prohibits a lawyer from knowingly advancing "a claim . . . that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension,

modification or reversal of existing law."*

This court recognized that ethical requirements limit the role of the advocate when in Dodson, 454 U.S. at 323, it said:

> Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer--whether privately retained or publicly appointed--not to clog the courts with frivolous motions or appeals.

(Footnote omitted.)

The attorney has, therefore, reached the limits of permissible advocacy once he concludes after conscientious

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*This is the wording in SCR 20.36(1)(b) as applicable when the no merit report was filed and when this brief was filed. As of January 1, 1988, the rule was repealed and recreated as SCR 20:3.1, which carries the same prohibition.

investigation that the appeal is frivolous. The attorney does not violate his role as an advocate when he thereafter in his brief explains to the court the reasons for his conclusion. In providing such an explanation, the attorney is not arguing against his client or acting as amicus curiae. The Wisconsin Supreme Court noted that the reviewing court "can distinguish between being informed by the one [i.e., an evaluation] and being convinced by the other [i.e., an argument against the client]." Cleghorn v. State, 55 Wis. 2d 466, 475, 198 N.W.2d 577 (1972). In this case, itself, the Wisconsin Supreme Court explained:

> We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts

> on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client . . . .

St. ex rel. McCoy v. Appeals Ct., 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987).

Whereas the advocate in reviewing the record and the law resolves all doubt in favor of his client, the amicus would conduct a detached evaluation and assess the issues by the test of how the appellate court would likely decide them rather than whether the issues had any arguable merit. See Evitts v. Lucey, 469 U.S. 387, 394 (1985); Robinson v. Black, 812 F.2d 1084, 1086-87 (8th Cir. 1987); and State v. Allen, 99 N.J. Super. 314, 239 A.2d 675, 679 (1968).

Because the attorney fulfills the advocacy obligation and role by resolving all doubts in favor of his client while

reviewing the record and the law, the discussion requirement in Wisconsin Rule 809.32(1) does not infringe upon the attorney's duty to be an advocate for his client; and, therefore, the rule is not inconsistent with Anders and it does not violate McCoy's constitutional rights.

This result has been reached, at least implicitly, in other jurisdictions that have found a discussion requirement as part of the no merit brief to be in compliance with Anders. See Nell v. James, 811 F.2d 100, 104 (2nd Cir. 1987); United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985); Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), approving an evaluation of a no merit conclusion in a Wisconsin conviction; Com. v. Moffett, 418 N.E.2d 585, 592 (Mass. 1981); People v. Lowery, 86 A.D.2d 537, 445 N.Y.S.2d 992, 993 (1982); McClendon, 434 A.2d at

1188; and Caraway v. State, 560 S.W.2d 690, 691 (Tex. Crim. App. 1978).

McCoy contends that Anders and Ellis prohibit a discussion requirement. That is not so. Ellis required the attorney to act as advocate for the client. Ellis, 356 U.S. at 675. As explained above, Wisconsin Rule 809.32(1) does not interfere with the attorney's role as advocate. The United States Court of Appeals for the District of Columbia Circuit, in order to implement the holding of Ellis, developed guidelines for appointed attorneys which provided, among other things, that in filing a memorandum that analyzed the cases and cited record references, the attorney should also cite "'any case or cases upon which counsel relied in arriving at his ultimate conclusion.'" Johnson v. United

States, 360 F.2d 844, 845 (D.C. Cir. 1966).

The Court in Anders, after relying on Ellis and requiring attorneys to act as advocates for their clients, invited readers to compare the rules in the District of Columbia to the amicus curiae actions of the attorney who acted improperly in Anders. See Anders, 386 U.S. at 744 n.3 and accompanying text. Although in citing the District of Columbia guidelines this Court said it was not indicating approval of them, surely this Court would have disapproved of them if the discussion requirement in those rules infringed upon the attorney's advocacy obligation. This Court's reference to the guidelines in Anders should at least indicate that the attorney is not acting as amicus when he complies with a discussion requirement.

It is also interesting to note that Anders, himself, approved the discussion requirement in the District of Columbia rules. See Nickols, 454 F.2d at 470 n.7, where Anders is quoted as arguing in his brief that the practice in the District of Columbia Circuit Court of Appeals afforded more adequate protection than he had received because "'[c]ounsel must convince the court that the issues are truly "frivolous."'" In other words, Anders apparently did not see the discussion requirement as an infringement upon his attorney acting as his advocate.

B. The discussion requirement in Wisconsin Rule 809.32(1) helps assure that the attorney is providing his client effective representation.

One of the purposes for which Anders required the attorney to conscientiously examine the case and submit a brief was

to assist his client. Anders, 386 U.S. at 744. The discussion requirement helps achieve that purpose.

As noted in Nickols and by the Wisconsin Supreme Court in this case at McCoy, 137 Wis. 2d at 101, the discussion requirement assures the court that "counsel has 'discharged his obligation to his client in a competent and professional manner.' Nickols, 454 F.2d at 470." The Wisconsin court explained that the attorney's reasoned summary of the law militating against further appellate proceedings provides assurance "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law." McCoy, 137 Wis. 2d at 101.

The discussion requirement also aids the client by providing proof that the

attorney has accurately concluded that the appeal is frivolous. In the process of preparing a written statement explaining the conclusion that the appeal is frivolous, the attorney might change his mind and decide the appeal is meritorious after all. It is not unusual that in forcing one to carefully examine an issue, the task of writing a justification discloses gaps in reasoning that were missed when only thinking of the question. Therefore, the duty of writing the reasons for concluding the appeal is frivolous may uncover a meritorious issue that would have otherwise been missed by the attorney, and perhaps also the court when it satisfied its obligation to decide whether the appeal was, indeed, frivolous.

C. The discussion requirement in Wisconsin Rule 809.32(1) helps assist the court in its role of deciding whether the appeal is frivolous.

In Anders, 386 U.S. at 744, the court noted that the attorney can, without conflict, assist the court as well as his client. By providing a ready reference to the record and citations to legal authorities, the attorney provides assistance to the court.

The discussion requirement provides additional assistance to the court and, therefore, furthers the purposes of the brief required by Anders.

The court, not counsel, has the ultimate responsibility for deciding whether the case is wholly frivolous. Anders, 386 U.S. at 744. The attorney assists the court in performing that function when he explains how he concluded that the appeal was

frivolous. Nickols, 454 F.2d at 470. The Wisconsin Supreme Court in this case recognized that the discussion requirement is beneficial because:

> [T]he court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner.

McCoy, 137 Wis. 2d at 103.

The efficiency of the court is a legitimate factor to consider in the context of this case. A no merit report is being filed because an attorney

believes an appeal is frivolous. Among the reasons that an attorney is prohibited from advancing frivolous issues and cases are that they abuse the legal procedures, Comment to SCR 20:3.1, effective January 1, 1988, and they are a waste of time for the courts, the parties and the attorneys. Therefore, in the interests of efficiency, frivolous matters are prohibited.

Because the attorney files a no merit report in the interest of the efficiency of avoiding a frivolous appeal, the court should be permitted to adopt rules for efficient handling of no merit briefs. The assistance afforded the court by the discussion requirement improves the efficiency of the disposition of the matter. Without the help of the discussion requirement, the court or its staff or representatives of

the state must examine the entire record and evaluate the arguments presented in the brief just as they would in a regular appeal. In that situation the court and the state's attorneys are using the same time and energy to dispose of the no merit report as would be needed to handle a non-frivolous appeal. That is anomalous because the purpose of the no merit report is to short circuit the usual appeal proceedings and, in the interests of efficiency, avoid a frivolous appeal. If the no merit report creates the same or greater work than a regular appeal, then the no merit procedure has failed its purpose. Extra work should not be created when the purpose of avoiding frivolous matters is to reduce the court's workload.

The states should be permitted to implement the most efficient procedure

that does not infringe upon the defendant's constitutional rights. As argued above, the discussion requirement does not prevent the attorney from being an advocate for his client. Therefore, because the discussion requirement improves the efficiency of the court by easing its workload, the requirement should be permitted.

McCoy contends that the discussion requirement prevents his attorney from being his advocate because the attorney is pointing out information that is against his interest. However, even without the discussion requirement, the attorney by asking for permission to withdraw from the case is flagging the case as one that is without merit. No additional harm is done to the defendant when the attorney explains why he has flagged the case as meritless. And, even

if the defendant were somewhat harmed by the discussion requirement, that harm is outweighed by the assistance the discussion provides the court. In most situations, convenience to the court might not be used to balance against an interest of the defendant. In this context it would be appropriate, however, since a significant purpose for using a no merit procedure is efficiency for the courts, parties and attorneys.

The attorney is an officer of the court as well as an advocate for the defendant. Johnson, 360 F.2d at 846 (Burger, concurring). In the role of officer of the court the attorney can explain why the efficiency of the court and other parties would be served by permitting him to withdraw from a frivolous appeal. See McCoy, 137 Wis. 2d at 100. Without providing the

explanation for his conclusion, the attorney is in the position of asking to be relieved from an appeal that is frivolous while at the same time presenting arguments to support a request for relief for the defendant. The discussion requirement provides a vehicle for the attorney to harmonize those inconsistent positions.

McCoy argues at page 19 of his appellant's brief that, under the Wisconsin no merit procedure, the defendant's counsel would no longer be subjecting the appeal to the adversarial process.

That may be so; but that also seems to be the purpose of the no merit procedure. Under that procedure the attorney is permitted to withdraw because the appeal is frivolous and not worthy of being submitted to the adversarial

process. If the purpose of the no merit procedure is to take frivolous appeals out of the adversarial system then there cannot be error when the procedure succeeds in doing so. If the attorney believes the appeal is worthy of the adversarial process, the appeal should be pursued and he should not seek to withdraw from the case under the no merit procedure.

D. The authorities cited by McCoy do not establish that the discussion requirement of Wisconsin Rule 809.32(1) is in violation of Anders or that it violates McCoy's constitutional rights.

None of the cases cited by McCoy establishes that the discussion requirement in Wisconsin Rule 809.32(1) is in violation of Anders or that it violates his constitutional rights. Indeed, none of the cases analyzes a

discussion requirement in the same context as this case, i.e., a case where Anders is accepted as being satisfied in every other respect.

In United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985); State v. Leon, 451 P.2d 878 (Ariz. 1969); Allen; State v. Duncan, 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978); State v. Varner, 692 P.2d 753 (Utah 1984); and State v. Clayton, 639 P.2d 168 (Utah 1981), the courts did not analyze whether a discussion requirement is valid. Although those cases seem to not require an evaluation by counsel of the reasons for concluding the appeal is frivolous, they also do not state that such a requirement would be in violation of Anders or otherwise unconstitutional.

In Robinson, 812 F.2d at 1085-87; Smith v. United States, 384 F.2d 649, 650 (8th Cir. 1967); and People v. Feggans, 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21 (1967), the courts stated that counsel should not take the side of the government and argue against their clients in the briefs. In those cases, however, the attorneys did not act as advocates, i.e., they did not resolve all doubts on the issues in favor of their clients. The attorneys analyzed the issues in terms of how the court would be likely to decide them. In other words, the attorneys assumed the role of an amicus. It is not known whether the courts would have made the same statements had counsel acted as an advocate.

Even if all these cases are not distinguishable from the instant case, the arguments presented earlier in this brief more convincingly support the finding that the discussion requirement is permissible than these cases support a contrary finding. These cases do not include any analysis of why a discussion requirement would be in violation of Anders. Only the latter three even indicate in any way that such a requirement is impermissible; and in those cases the courts made the statement that counsel must not argue against his client in the context of situations where the counsel acted as amici. In other words, those cases did not find a discussion requirement invalid in a case where the attorney had acted as an advocate in examining the record and the law and in presenting the possible

arguments that could be raised on an appeal.

To the extent that any of these cases or any of the other cases cited by McCoy simply adopt a no merit procedure different from Wisconsin's, the cases are not relevant to this appeal. The states are free to adopt different no merit procedures to implement Anders as long as the procedures do not conflict with Anders or in any other way violate the defendants' constitutional rights. In response to Anders, states have adopted a variety of procedures. See, e.g., State v. Horine, 64 Or. App. 532, 669 P.2d 797, 802-03 (1983) and C. Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Criminal Justice Journal 45, 52-61 (1986). In this case, the only question is the validity of the Wisconsin

procedure. The existence of other procedures does not reflect either favorably or unfavorably upon the validity of Wisconsin's procedure; and therefore, they should be ignored. The validity of the discussion requirement must stand or fall on its own merits; and, as argued above, the requirement does not conflict with Anders or Ellis and it does not violate McCoy's constitutional rights.

CONCLUSION

For the reasons discussed above, the Wisconsin Court of Appeals, District I, requests this court to affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

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